Central Law Journal.

ST. LOUIS, MO., SEPTEMBER 21, 1906.

THE ATTACK ON THE SECOND-CLASS MAILING PRIVILEGE.

For the third consecutive time congress will be asked, this time with unusual seriousness and energy, to muzzle the entire periodical press of the country, by legislating prohibitive charges on all second-class matter. Every other time this matter has been presented, congress has laid the matter quietly to rest in the accumulated dust of some sepulchral pigeon hole. This time, however, the little coterie of interested promoters of this drastic legislation in the post office department seem determined to accomplish their purpose without regard to the consequences that must certainly follow. The whole trouble arises from the annual, indeed perennial, attempt of the postmaster general to justify the annual deficit in the postal department by assuming the attitude of the small boy who seeking to save himself from some impending paternal disaster throws the blame for the mishap that causes the storm on some other and innocent member of the family. The scape-goat in the present postal controversy seems to be the second-class mailing privilege, a department of the postal service which is just as innocent of any crime or wrong against the federal government at the present time as in the earlier days of our republic when our fathers properly or improperly thought wise to encourage the progress of literature and science by making it possible for publishers to print and mail large editions of their publications as sample copies to increase their circulation and to enable them to reduce the price to be paid for yearly subscriptions to a minimum.

If the action of our fathers were wise at the time they instituted the second-class mailing privilege, it is wise to-day; if it were unwise then, it is unwise to-day. May it not be, however, that the statesmen of the last generation looked upon such questions as a small deficit in a great beneficial department of the government with a larger apprehension of the true situation than our statesmen of to-day? May it not be true that we are to-day, especially in the matter of the postal deficit, insisting too much on the "tithes of mint, anise and cummin," and forgetting the weightier matters of the law. Daniel Webster in his vision of the essential principle of the whole subject said: "All is not lost while we have a single newspaper that is free. Given a free press, and we may defy open or insidious enemies of liberty. It instructs the public mind and animates the spirit of patriotism. Its loud voice suppresses everything which would raise itself against the public liberty, and its blasting rebuke causes incipient despotism to perish in the bud." This was the broad view of the earlier statesmen, who kept it constantly before them as they legislated, always and constantly in the direction of a wider and an ever-widening circulation of the influence of the press, avoiding and distrusting the man who would attempt to muzzle it, to restrict its circulation or in any manner hinder the execution of its beneficent purpose of spreading the news and inspiring a thirst for knowledge. Have we come upon different times? Has the press too much power that it must be curbed? Has periodical literature multiplied so fast that we curtail the output? Has magazine literature become so cheap that we must call a halt lest the poor man will learn too much and be dissatisfied?

Readers of this Journal may be surprised that such strong language should be necessary in regard to a movement that has as yet attracted little public attention. "Surely," said a prominent business man to whom we explained the situation recently, "congress will pay no serious attention to the preposterous recommendation of the postal department to quadruple the cost of the mailing privilege to all publishers of weekly and monthly periodicals." We were compelled to answer him that congress had paid enough attention to the matter as to appoint what is said to be an unfriendly commission to hear testimony and report a bill if they think advisable to raise the rate on second-class matter from one cent to four cents per pound or higher in accordance with the recommendation of the postal department. This commission consists of Hon. Boise Penrose, Hon. Thomas H. Carter, Hon. A. S. Clay, Hon. Jesse Overstreet, Hon. John J. Gardner and Hon. John A. Moon. We have found it hard to believe,

however, that a commission composed of such representative statesmen could be said to have settled convictions against the contentions of the publishers whose claims they are about to pass upon, and we trust the report to that effect is unfounded.

The postal department's contention that the second-class mailing privilege is the sole cause of the postal deficit of fourteen million dollars, is as ridiculous as it is unwarranted by the facts. The error in the calculation is conclusively shown by the statement that the franking privileges of the departments and of members of congress costs the government twenty million dollars, while the rural free delivery, a new and highly beneficial arm of the postal service, just added, costs twenty-five million dollars. Why not charge the deficit to either of these two accounts, neither of which produce any income. Indirectly, the second-class mailing privilege brings to the coffers of the post office department a very large share of the revenue derived from all the other classes. The great mail order business houses have been built up through advertising in weekly and monthly periodicals resulting in a very large increase of the other classes of mail. One advertiser in a large national weekly, states that he received twelve thousand replies to one advertisement. Multiply this "ad." by more than one hundred other "ads." in the same issue of this large weekly and then multiply this result by one thousand other weekly and monthly periodicals and even a mind deeply prejudiced against the public press of this country must be brought to realize that it is the second-class mailing privilege that is responsible for the greater part of the large income resulting from first-class mail matter which it is admitted is carried at a profit. If the postal department desires to play the fool and kill the goose that lays the golden egg, let them lay violent hands on the periodical press of the country and cripple its circulation and its influence by depriving publishers of the benefits of the second-class mailing privilege.

The postal department has the mistaken idea that just because the second-class mailing privilege does not return in dollars and cents the actual cost of its carriage through the mails that it alone is the sole cause of the deficit and should, therefore, be abolished,—taking no thought of the public interest which the second-class mailing privilege is supposed to serve, an interest which falls not so far from being as important to the public as the franking privileges of our statesmen or our rural free deliveries. Of course, if the second-class mailing privilege served no public purpose whatever, it would be ridiculous to carry it below cost and thereby merely subsidise a private interest, but where the public interest served is so transcendent as that served by the periodical press, to-wit, the dissemination of learning, the government could well afford, if necessary, to carry such matter free of charge, where the alternative would be its destruction. But where, through the experience of the publishers, a rate has been found which is at once fair to the publisher and to the federal government, the latter should appreciate the value of the publisher's efforts and the public interest he is serving, to the extent, at least, of putting the proper valuation on such services before entering into any calculation for determining the deficit on second-class matter.

NOTES OF IMPORTANT DECISIONS.

GARNISHMENT PROCEEDINGS WHEN DEBT IS DUE BY A FOREIGN CORPORATION.—In the case of Krafoe v. Roy & Roy (Winner Torgerson Lumber Co., Garnishee), garnishee proceedings were brought in the municipal court of Minneapolis, Minn. It appears that the garnishee disclosed the fact that it was indebted to the defendant in the sum of $293.20. Defendant, through its attorneys, appeared specially and moved to discharge the garnishee and release the property from the garnishment, and for an order dismissing the action on the ground that the court had no jurisdiction over the property of defendant and acquired none by the garnishment of the indebtedness in question.

The matter is put very concisely in the opinion itself, from which we quote as follows: "It is contended by defendant that the debt due from the garnishee had no *situs* in the state of Minnesota, and for this reason the court acquired no jurisdiction of the parties or the action by the garnishment proceedings. It appears from the record that the plaintiff is a resident of this state; that defendant is a corporation, created and doing business in the state of Washington; that the garnishee is a corporation, created under the laws of and with its principal place of business in the state of South Dakota, but maintaining an agency in the state of Minne-

sota for the transaction of business therein, which agency is in charge of one of its officers. The transaction out of which the indebtedness in question arose took place in this state, and according to the showing made, was payable at Minneapolis; the usual method of payment being by draft upon a bank in this state mailed to defendant at its place of business in Washington. The question presented is whether, under such circumstances, the indebtedness can be reached by garnishment. We are of opinion that the court below ruled correctly on the proposition. This is not a case where a nonresident debtor comes temporarily into the state and is served with garnishee summons while within its borders. Here, the garnishee, through a nonresident corporation, maintains an agency in the state for the purpose of transacting business therein; and the indebtedness arose out of a transaction occurring in the state with that agency. The authorities sustain the right of garnishment in such cases. Insurance Co. v. Corbetts, 165 Ill. 592, 46 N. E. Rep. 631, 36 L. R. A. 640, 56 Am. St. Rep. 275; Insurance Co. v. Ming (Ariz.), 60 Pac. Rep. 720; Railway Co. v. Bartels, 108 Ky. 216, 56 S. W. Rep. 152. It was held in Harvey v. Railway Co., 50 Minn. 405, 52 N. W. Rep. 905, 7 L. R. A. 84, that for purposes of attachment, a debt has a *situs* wherever the debtor can be found. Wherever the creditor might sue for its recovery, there it may be attached as his property. The place of payment is immaterial. The rule as there laid down, properly limited, is in accord with the general trend of the authorities. The only limitation permissible is to the effect that the rule does not apply to a debtor temporarily within the state; and such was the only qualification or modification that was intended to be suggested by Mr. Justice Collins in McKinney v. Mills, 80 Minn. 478, 83 N. W. Rep. 452, 81 Am. St. Rep. 278. In the case at bar, as already stated, the garnishee was not temporarily within the state, but had a permanent agency therein for the transaction of its business, and the case comes squarely within the rule laid down in the Harvey Case, as limited and qualified in the McKinney Case. It was not necessary that it be affirmatively shown that the garnishee had complied with our statutes imposing conditions upon which foreign corporations may do business in this state. Compliance with the statutes is presumed in the absence of a showing to the contrary. Lehigh Coal Co. v. Gilmore, 93 Minn. 432, 101 N. W. Rep. 796, 106 Am. St. Rep. 443. The point is made that the order under review is not appealable. It is clear that an order refusing to discharge a garnishee in an action in which the court has jurisdiction of the parties is not appealable. It is equivalent to an order for judgment against him, and the appeal must be taken from the judgment. Croft v. Miller, 26 Minn. 317, 4 N. W. Rep. 45; Pillsbury v. Foley, 61 Minn. 434, 63 N. W. Rep. 1027. But here the defendant, by his motion to discharge the garnishee and to dismiss the action, challenges the jurisdiction of the court to proceed further in the action, and the order is appealable. Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. Rep. 1124. The appeal in McKinney v. Mills, 80 Minn. 478, 83 N. W. Rep. 452, 81 Am. St. Rep. 278, was from a similar order." In this connection see 61 Cent. L. J. 42, also able article by Professor John R. Rood of Michigan University Law School, entitled, Exit of the Doctrine of Situs, 61 Cent. L. J. 265.

CONTEMPT—REFUSAL TO OBEY JUDGMENT IN QUO WARRANTO PROCEEDINGS HELD CONTEMPT, NOTWITHSTANDING ADVICE OF COUNSEL.—In the recent case of State v. Cahill (Iowa), 108 N. W. Rep. 453, an action of *quo warranto* was instituted in the district court of Cedar county by Thomas Brick, claiming to be the legally elected and qualified subdirector of subdistrict No. 2, school township of Gower, Cedar county, to test the right of William Cahill to hold such office and perform the duties thereof as a subdirector, claiming to hold over in office from a previous term for want of a legally elected and qualified successor. Such action was tried to the court, and resulted in a judgment finding that Cahill was guilty of unlawfully exercising the functions and performing the duties of the office in question; and it was adjudged that he be ousted and removed therefrom. It was further found that the relator, Brick, was the lawful incumbent of the office, and Cahill was ordered to deliver all property of the district to him, said Brick. From such judgment an appeal was taken to the supreme court and on application to one of the justices an order was made and entered restraining the enforcement of the judgment pending the appeal. The cause having been submitted to that court, an opinion was filed January 17, 1906, affirming the judgment of the trial court. Thereafter information as for contempt was filed by Brick, charging that since the said judgment and the affirmance thereof by the supreme court, said Cahill was persisting in the usurpation of the functions and in the exercise of the duties of said office, and depriving him, said Brick, thereof; that at the meetings of the school board said Cahill assumed the right to and did act and vote as a director on recognition by the presiding officer of the board, to the exclusion of him, said Brick. * * * As indicated by the averments of the answer so filed, Cahill, plaintiff in this proceeding, seeks to have the judgment entered against him annulled on two grounds: (1) That the restraining order holds good until the action of *quo warranto* is fully disposed of in this court on rehearing; (2) that the things done by him as alleged, and which were proven upon the hearing substantially as alleged, are not sufficient in law to make out a case of contempt. The effect given to the restraining order was to supersede an enforcement of the judgment, and counsel for defendant make no question but that plaintiff was entitled to oc-

cupy and perform the duties of the office in question up to the time of the filing of the opinion on appeal in the supreme court. The question, then, is, did the steps taken to secure a rehearing in this court operate to continue the restraining order in force? We think not. The situation was the same as though the appeal was from a judgment for damages in an ordinary law action and a supersedeas bond had been given. A notice of the petition for rehearing has no effect to suspend the decision, and a petition filed has no such effect, unless "the court or one of the judges upon its presentation so order." Code, § 4148.

Coming to the second ground of contention, we have to say that the finding of contempt was fully warranted. The judgment in the main case found Cahill guilty of an unlawful usurpation of the office and ousted him therefrom. In effect it was an order or command that he cease to exercise any of the duties of such office. In the chapter of the Code devoted to proceedings of *quo warranto* it is provided that "any person who without good reason refuses to obey an order of the court, as herein provided, shall be guilty of contempt. Code, § 4335. Moreover, the judgment was self-executing. Jayne v. Drorbaugh, 63 Iowa, 711, 17 N. W. Rep. 433; 23 Am. & Eng. Ency. p. 629. And by general provision of statute obedience to such is to be coerced by attachment as for contempt. Code, § 3954. That plaintiff acted in the premises on the advice of counsel could not serve to excuse him. 9 Cyc. p. 25.

The court concluded that the judgment complained of was proper to be entered. Proceedings were dismissed.

CONSTITUTIONAL LAW — RELIGIOUS GARB WORN IN PUBLIC SCHOOLS CONTRARY TO CONSTITUTIONAL PROVISIONS FORBIDDING USE OF PROPERTY OF THE STATE IN AID OF SECTARIAN INFLUENCES.—The New York Court of Appeals decided a question which has been up before in other jurisdictions, but decided contrary to the New York court's conclusion. In the case of O'Connor v. Hendricks, 77 N. E. Rep. 612, it was held that a regulation of the superintendent of public instruction prohibiting teachers in public schools from wearing a distinctly religious garb while teaching therein is a reasonable and valid exercise of the powers conferred upon him to establish regulations as to the management of public schools, because the influence of such apparel is distinctly sectarian, and the prohibition is in accord with the public policy of the state as declared in Const. Art. 9, sec. 4, forbidding the use of property or credit of the state in aid of sectarian influences. In the case of Hysong v. Gallitzin Borough School, 164 Pa. St. 629, a bill was filed to restrain the directors of Gallitzin Borough School District from permitting sectarian teaching in the common schools of the borough and from employing as teachers sisters of the order of St. Joseph, a religious society of the Catholic church; the court found that there was no evidence of any religious instruction or religious exercises of any character whatever during school hours; that the wearing of the peculiar garb of the order was not within the constitutional prohibition. The dissenting opinon by Mr. Justice Williams was regarded as the better view by the New York court which would seem to be the better view of the matter, which is to be found discussed in a note to a leading case entitled Hackett v. Brooksville G. S. D., 61 Cent. L. J. 55.

POWERS OF REVOCATION IN DEEDS.

Attorneys are frequently called on to draw deeds of family settlement, conveyances by parents to children, or others, in consideration of an agreement to support the grantors during the remainder of their lives, and the like. These transactions are attended with the danger of depriving the grantor of property for which no return is given, a misfortune not contemplated at the time. Sometimes they concern the welfare of persons unfitted to manage their own property, but who, while desiring to prevent dissipation, do not wish to relinquish control over it. More frequently, however, they involve the entire, or greater part, of the property of aged people, which represents the accumulation of years and on which they must depend for maintenance. Too often such conveyances result in placing the property beyond the control of the grantor, and the grantor at the mercy of those benefitted, or making litigation necessary in a case of misplaced confidence. Yet, notwithstanding the miscarriages of justice shown by the reports to have so frequently occurred, trust in one's relatives does not abate, and the desire to make family settlements does not decrease; and notwithstanding the uncertainty of such a course, clients sometimes prefer to dispose of property during their life time, rather than direct how it shall be done after their death, believing that their wishes in that regard are less liable to be thwarted by a disposition they, themselves, may make, than by a distribution according to the law of descents, or if only a will, subject as it is to attack, be left to direct.

Is there not a way, known to the law, of protecting such persons, while still making a disposition to their satisfaction? It would

seem that they would be amply secured in most instances by the insertion in the deed of a power of revocation. While this protection does not seem to have been universally relied on in this country, judging from the many instances where it was omitted from deeds of settlement without apparent reason, the power to revoke a deed by virtue of a reservation of that right has long been recognized under the law of England. Coke has sanctioned such a power.[1]

The law in England, by which the same property can be kept in the same family for many years, has, perhaps, caused greater importance to be given in that country than in this to the insertion in deeds of settlement of a power of revocation and appointment to other uses. In fact, the British courts, in their discussions of the subject, give more attention to the omission of such a power as perpetrating a fraud on the grantor, than to the reservation of such a power as being a constructive fraud on others, or to the validity of such a reservation. Concerning family settlements, they say, that any one taking any advantage under a voluntary deed and setting it up against the donor, must show that he thoroughly understood what he was doing, or, at all events, was protected by independent advice. It has been almost laid down that where there is no power of revocation the deed will be set aside.[2] But later decisions have modified and so construed these cases so that it cannot be said that a voluntary settlement is voidable unless it contained a power of revocation. According to these authorities, the absence of a power of revocation is a circumstance to be taken into account in connection with the other circumstances of the case; the absence of advice by counsel given the grantor as to the propriety of inserting such a reservation stands on the same footing.[3] But these authorities recognize beyond question the validity of such a power in a deed, and our own courts, when the question has been presented to them, have been inclined to favor this plan for protecting the grantor.

[1] Butler's Case, 3 Coke, 25.

[2] Coutts v. Acworth, Law Rep. 8 Eq. 558; Wollaston v. Tribe, Law Rep. 9 Eq. 44; Everitt v. Everitt, Law Rep. 10 Eq. 405.

[3] Toker v. Toker, 3 De G., J. & S. 487; Hall v. Hall, Law Rep. 8 Eq. 430; Phillips v. Mullings, Law Rep. 7 Eq. 244.

It cannot be said that the grantor does not part with his power or dominion over the property conveyed because he retains a right to annul or revoke the deed. A power of revocation is perfectly consistent with a grant or the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the grantee and remains vested, notwithstanding the existence of a right to revoke it. If this right is never exercised according to the terms in which it is reserved, before the death of the grantor, it can have no effect on the validity of the conveyance or the right of the grantee to the property.[4]

The argument that the reservation of a power of revocation nullifies the conveyance is answered by the opinion of the court in the case of Jones v. Clifton.[5] That case involved a conveyance by the husband to the wife of certain realty, the deed containing a clause reserving to the grantor "the power to revoke the grant in whole or in part, and to transfer the property to any uses he might appoint, and to such person or persons as he might designate, and to cause such uses to spring or shift as he might declare." The conveyance was made at a time when the husband was not involved, but subsequently became embarrassed, and was adjudged a bankrupt. The assignee in bankruptcy contended that the deed passed no interest to the wife as against creditors, but was fraudulent as to future creditors, the husband retaining and controlling the use of the property; and further insisted that the power of revocation and appointment passed to the assignee for the benefit of creditors. The court held that "the right of a husband to settle a portion of his property on his wife, and thus provide against the vicissitudes of fortune, when this can be done without impairing the existing claims of creditors, is indisputable." The court proceeded also to say: "The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. Indeed, such res-

[4] Stone v. Hackett, 12 Gray, 232; Van Cott v. Prentice, 104 N. Y., 10 N. E. Rep. 257; City of Providence v. St. John's Lodge, 2 R. I. 46.

[5] Reported in 101 U. S. 225.

ervations are usual in family settlements, and are intended to meet the ever-varying interests of family connections. So frequent is the necessity of a change in the uses of property thus settled, arising from the altered condition of the family, the addition or death of members, new occupations or positions in life, and a variety of other causes which will readily occur to every one, that the absence of a power of revocation and appointment to other uses in a deed of family settlement has often been considered a badge of fraud, and, except when made solely to guard against the extravagance and imprudence of the settler, such settlements have in many instances been annulled on that ground." In the same case the court held that the power reserved was not an interest in the property which could be transferred to another, or sold on execution, or devised by will. While the grantor might exercise the power by deed or will he could not vest the power in any other person to be thus executed. Neither was it a chose in action, so as to constitute assets of the bankrupt in the hands of his assignee.

If a voluntary deed is given by a person weakened in body or mind at the behest of one enjoying a confidential relation, the absence of such a power will impose the burden of proof on the person taking the benefit to show distinctly an intention to make the gift irrevocable.[6] It has also been contended that a deed containing a power of revocation is in effect a will, and objectionable on that ground. But if an instrument is on its face and in legal effect a deed, and passes a present interest, the power inserted in it does not change its character, notwithstanding the possession of the property conveyed is postponed,[7] or the enjoyment thereof was not to commence until after the grantor's death.[8]

In a Kentucky case,[9] the court considered the validity of such a reservation in a deed from a different point of view. Subsequently to the delivery of the conveyance the grantee conveyed a proper deed, a right-of-way through the land to a railroad, which constructed its right-of-way through it. The original grantor then executed a deed of revocation in conformity with the provisions of the deed containing the power. The validity of the revocation was assailed as being, among other things, contrary to public policy for the reason that it would enable the parties to the deed to defeat the rights of the grantee's creditors; in other words, that, after becoming indebted, the grantor by exercising the power of revocation would thereby divest the grantee of property which would otherwise be subject to the claims of his creditors. But this contention was considered untenable, inasmuch as the deed itself was notice to the grantee's creditors of the reserved power. It was also objected, in this case, that the reservation of power to revoke was an attempt to impose a condition subsequent, which was void, under the rule stated by Blackstone[10] that a vested estate shall not be defeated by a condition subsequent either impossible of execution, illegal or repugnant. However, the argument did not find favor with the court.

Under the old rule, a power to revoke a deed might have been exercised by re-entry merely, or now, perhaps, by proper notice to the grantee.[11] However, it would probably be wiser to state in the deed how the power therein reserved might be carried out. The mere fact that the law does not recognize the form of the revocation will not operate to defeat it, if it has been exercised in the manner assented to by the parties. Thus, where a deed provided that a revocation, to be effectual, should be an instrument under seal, acknowledged and recorded, as deeds of land are required to be recorded according to law, a revocation in compliance therewith could not be defeated by the fact that the acknowledgment and recording of such an instrument was not provided for by statute.[12] But the act of revocation, to be effectual, must be complete. The interest of a grantor will not be divested by a deed of revocation executed by the grantor in anticipation of a settlement with his creditors, and destroyed by him on failure to effect such settlement.[13]

Since the nature of the power is to leave to the free will and election of the grantor the question whether it shall or shall not be ex-

[6] Miskey's Appeal, 107 Pa. St. 629.

[7] President, etc., of Bowdoin College v. Merritt, 75 Fed. Rep. 480.

[8] Nichols v. Emery, 109 Cal. 323, 41 Pac. Rep. 1089.

[9] Ricketts v. R. R. Co., 91 Ky. 221, 15 S. W. Rep. 182, 11 L. R. A. 422, 34 Am. St. Rep. 176.

[10] 2 Bl. Com. 156.

[11] Ricketts v. R. R. Co., *supra*.

[12] Ricketts v. R. R. Co., *supra*.

[13] Hill v. Cornwall, 95 Ky. 526, 26 S. W. Rep. 540.

ecuted, a court of equity will not interfere in a case of non-execution, though the non-execution is caused by accident or mistake. But if the exercise of the power was attempted, and was defective, but the intent to revoke is clear, equity would aid the defective execution.[14]

CHAS. L. BARTLETT.

Quincy, Ill.

[14] 22 Am. Enc. of Law, 1127.

EMINENT DOMAIN — WHEN THERE IS CONFUSION OF INTERESTS PUBLIC AND NOT.

STATE v. SUPERIOR COURT OF THURSTON COUNTY,

Supreme Court of Washington, June 9, 1906.

Under Const. art. 1, § 16, prohibiting the taking of private property for private use, a corporation cannot condemn property to further not only the operation of a municipal light plant and electric car system, but also the business of selling electricity generally.

DUNBAR, J.: Respondent, a domestic corporation, with its principal place of business at Olympia, filed its notice and petition in the superior court of Thurston county, Wash., for the condemnation and appropriation of certain real property situate in Thurston county, Wash., belonging to the relators. The respondent is a light and power company, and under certain charter provisions is employed to furnish light to the cities of Olympia and Tumwater, and to run electric cars in and between the cities of Olympia and Tumwater for hire. The electricity which is used by the company is generated by water power from water which flows down the Des Chutes river. It is alleged in the petition that there is not sufficient water to furnish power for the company to carry out the provisions of its charter in furnishing electricity to the cities of Olympia and Tumwater, and in operating their electric cars, and for the purpose of furnishing such power as it has been furnishing at reasonable and uniform rates to the public generally. The petition, among other things, is as follows: "That your petitioner has not been, nor does it intend to engage in any other corporate purposes except as herein set out, except it admits it has been engaged in furnishing electric power at reasonable and uniform rates to the public generally and without discrimination between persons substantially similarly situated, and is bound to continue to so furnish electrical power to the general public at reasonable and uniform prices and without discrimination between persons substantially similarly situated." The testimony in the case is also to effect that the condemnation is sought for the purpose of obtaining additional power not only for use in operating the light plant and the electric car system, but for the purpose of selling power to the different manufactories and for different purposes. So that the question presented is whether or not the furnishing of power outside of the power necessary to operate its electric cars and lighting system is a public use. This question was raised by the pleadings, and the court found that such use was a public use, that the respondent had the right and power to condemn, that there was a necessity for the condemnation, ordered the question of the compensation to be paid the relator to be submitted for the determination of a jury. This proceeding was brought to review that order.

The land sought to be condemned was land which would be overflowed by raising a dam in the Des Chutes river creating a reservoir for the purpose of storing the waters of the Des Chutes river and using the same in times of low water. We held, in the State of Washington, on the relation of Marian E. Harlan, plaintiff, v. Centralia-Chehalis Electric Railway Power Company, respondent, 85 Pac. Rep. 344, that the operation of an electric car was a public use, and the right of condemnation existed for the purpose of obtaining power necessary for the prosecution of such business. It is also, we think, without question, now admitted that the furnishing of electric lights to a municipality is a public use which warrants condemnation of private property. In the case last mentioned it was said that if a private use is combined with a public one in such a way that the two cannot be separated, then unquestionably the right of eminent domain could not be invoked to aid the enterprise. And many cases were cited to the effect that the statute authorizing the condemnation of property for uses, a part of which only are of a public nature, is in violation of the rule that private property cannot be taken for private use, and hence cannot be enforced. And that the courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as set forth in the articles of association, but evidence aliunde, showing the actual business proposed to be conducted, may be considered. And in that case, where under the articles of incorporation the company was entitled to engage in private enterprises, it was held that inasmuch as the application to condemn was made for a public use only, namely, to obtain power to prosecute the business of running electric cars, that the right to condemn would not be withheld. In this case it will be observed that under both the application and the proof the power of condemnation was sought for the purpose of obtaining power to furnish to other enterprises in addition to the charter uses of the respondent. And while this question was not directly decided in the case last referred to, it has been, it seems to us, directly decided adversely to respondent's contention by this court in State v. White River Power Co., 39 Wash. 648, 82 Pac. Rep. 150, where it was held that the right of eminent domain cannot be exercised in favor of an

electric light and power corporation organized for the purpose of diverting water for power purposes for the generation of electricity to be sold commercially to manufactories, railways and cities, in the absence of statutory regulation and guaranties of the public use and enjoyment of the property. Since the same is not a public service corporation, and the use is not a public use, in this case, of course, the respondent is only a public service corporation for the purpose of furnishing light and operating cars as above mentioned, and evidently is not a public service corporation for the purpose of engaging in the business which the White River Power Company was engaged in, and in the exercise of which it was held not to be a public service corporation, and therefore it is seeking to take private property for a private use, in violation of Sec. 16, Art. 1, of the state constitution. In the White River Power Company case many decisions were cited to sustain the doctrine that such uses as we are discussing were not public uses, and it was there said that: "The question is not a new one in this court. It was fully considered, in relation to another statute, in the case of Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. Rep. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964," and citations from Lewis, Eminent Domain, and many other cases were cited to sustain the doctrine announced in the Healy Lumber Co. case, in which case we decided that the public use authorizing the exercise of the right of eminent domain contemplated by the Constitution is not synonymous with public benefit, and a use of private enterprises does not authorize the exercise of the right, however much public policy demands it, or whatever the public benefit therefrom may be, but it must be a use by the public or by some agency that is *quasi* public. And the authorities pro and con on this question were set out at length in that case.

In view of the elaborate discussion and multifarious authorities cited in the two cases just mentioned, we do not deem it necessary to again go into a discussion of the question on its merits, but refer to those cases, and the case of Brown v. Gerald (Me.), 61 Atl. Rep. 785, 70 L. R. A. 472, an exhaustive and instructive case where the authorities are marshaled, and the conclusion reached that manufacturing, generating, selling, distributing and supplying electricity for power for manufacturing or mechanical purposes, is not a public use for which private property may be taken against the will of the owner. That a public use, such as justifies the taking of private property against the will of the owner, cannot rest merely upon public benefit, or public interest, or great public utility. In the course of the opinion in that case, it was said: "We think that the ultimate use of the power is an important consideration. If that use is essentially a private use, in a private business, will it become a public use by merely multiplying the number of persons who may have occasion to use the power? If it would not be a public use to supply power for one mill, would it be such to supply for two mills, or for six, or for twelve? We think not. In each individual case it would be supplying the power for a private use. If the state cannot take the property of one and give the use of it to another for private use, can it give the use to that other, in order that in the form of electric power he may distribute the use to a dozen others for their private business purposes? We think not. There is no underlying necessity or peculiarity in the business of distributing electric power which requires any such enlargement of the power of eminent domain. There seems to be such a necessity in the cases of all the *quasi* public corporations which we have mentioned. Railroads and telegraph, telephone and water companies cannot be built and maintained by individuals for their several use, each one for himself. There is an 'impossibility,' to use Judge Cooley's words, 'of making provisions for them otherwise' than through the power of eminent domain. But every man can, if he wishes, have a mechanical power of his own, either steam, or water or electric. He can serve himself without the intervention of the state—not so conveniently or advantageously, perhaps, as it would be to be served by others. But mere convenience and advantage in private business must yield to the property rights of citizens sacredly guarded by the Constitution." It must be admitted that many things are considered a public use now that were not so considered a half or even a quarter of a century ago, and it may be, and it is probable, that in the not distant future many things which are now considered a private use, by the changing conditions and evolution of business, will of necessity become a public use, but until such change is made manifest, private property must be protected from condemnation in that behalf.

The judgment of the lower court will be reversed, but the respondent, if it desires, may amend its complaint asking for condemnation of land sufficient for the purpose which we have indicated were of public use, and the proof must be confined to the necessity of such use.

NOTE.—*Question as to what is a Public Use under the Exercise of the Right of Eminent Domain, and the Rule, where there is a Confusion of Interests, Some of which are for a Public Use and Another of which is Not.*—The principal case is an extremely interesting one, in that it seems to be the result of a test of the law dealing in the first instance, with the character of a certain industry, as to whether it is a public or a private use, and in the second place, concerning the question as to the right of a corporation to condemn private property under the right of eminent domain, where there is a confusion of interests and purposes, some of which are doubtless for a public use or benefit, and some of which are, to say the least, on debatable ground. The first question alluded to brings up a vast field of authorities conflicting and unsettled, although there seem to be two very well defined classes, one of which holds to a very strict construction of what constitutes a public use, another of which has gone so far as to state that "public use" is

synonymous with public benefit, utility or advantage. But the American & English Encyclopedia of Law well says, in vol. 10, p. 1063: "In general, however, it may be said that by reason of the changing conditions of society, no arbitrary definition of what constitutes a public use has been attempted by the courts. The meaning of the term is flexible, and is not confined to what may constitute a public use at any given time," recognizing wisely the necessarily flexible meaning of the term in a very rapidly growing country.

In Brown v. Gerald, 70 L. R. A. 472, under the provisions of defendant's charter it was permitted to engage in the manufacture, generation, selling, distributing and supplying of electricity for lighting, heating, traction, manufacturing or mechanical purposes in and between certain towns in Washington. The company obtained a large and valuable contract to furnish power to a company located about two miles away from headquarters of defendant company, and in order to transmit such power it was necessary to institute condemnation proceedings over a certain strip of land in order to obtain location for its poles and wires. These proceedings were instituted under guise of an attempted lighting of the district between defendant and the party to whom it was to furnish power, realizing that under their charter particularly and under the decisions of most of the states, the constitutionality of the condemnation proceedings would not be considered if they were shown to be for this *bona fide* purpose. However, plaintiff's land was involved, and he brought these proceedings. The evidence showed that there was absolutely no demand or necessity for providing electricity for lighting purposes, and that the condemnation proceedings were brought as a necessity merely for the purpose of taking advantage of the aforesaid valuable contract for furnishing power to one large company. Under these facts arose the question as to whether a taking under the circumstances could be sustained under the charter. Now, though it is conceded that by the great weight of authority the question as to "whether it be wise, expedient and necessary that the right of eminent domain be exercised, in case the use is public, is solely for the determination of the legislature," nevertheless, "the legislature cannot make a private use public by calling it so." And whether the use for which it is granted is a public one must in the end be determined by the courts. The court, in addition to a discussion of the meaning of "public use," insistently advances the principle that the test is the object to be accomplished, and that that object must not be inseparably accompanied by or incidental to an ulterior private purpose, and in this case the court declared the condemnation proceedings unconstitutional.

In *Re* Barre Water Co., 62 Vt. 27, it was held that a water company having authority to take private water for the extinguishment of fires and for domestic, sanitary and other purposes, cannot use water of private stream for private manufacturing purposes. In Proprietors of Locks and Canals v. Nashua & Lowell R. R. Co., 104 Mass. 1, the defendant railroad company condemned land and erected thereon a freight house. The latter was subsequently remodelled and extended, more land being involved, and was leased for private manufacturing purposes. The character of the freight house was not so changed, however, that it could not subsequently have been used as a freight house. The court says: "Any uses of lands confessedly used for other purposes, or not apparently for purposes permitted by its charter, are not protected by its authority. For such uses the owner (of land condemned) may have his redress by any appropriate action."

In *Re* Eureka Basin W. H. & Mfg. Co., 96 N. Y. 42, the Eureka company was first organized as a private corporation, permitted by its charter to acquire by purchase, gift or otherwise, certain swamp lands for the purpose of erecting wharves, warehouses, foundries, etc., thereon. Later an act was passed giving the company a *quasi*-public character by enabling it to erect basins for public use and to avail itself of the right of eminent domain in obtaining land therefor. It was found, however, that under the general provision of its charter and the special character given it as a *quasi*-public corporation, it was really exercising the right of eminent domain for private purposes. The court says: "We cannot regard such a project as a public purpose or use which justifies the delegation to this company of the right of eminent domain. The enterprise is in substance a private one, and the pretense that it is for a public purpose is merely colorable and illusory." The provision of the legislature was declared unconstitutional.

We may readily see the irreparable wrong to the right of property which might be consummated by large corporations taking advantage of their privilege, so conducive to progress and a greater development of the country's resources when properly used, for merely private purposes and individual benefit, and we may readily comprehend the necessity for looking carefully into the ultimate purpose of every such condemnation of private property under the exercise of this most valuable privilege.

St. Louis, Mo. LELAND A. WIND.

JETSAM AND FLOTSAM.

RIGHT OF APPELLATE COURT SUA SPONTE TO ORDER A REMITTITUR.

State Senator Will G. Graves, of Spokane, Washington, recently defied the supreme court of that state, and declared to the court that while the charges he had made against the tribunal were harsh, he believed "the conclusions were justified by the facts," and in effect told the court that unless it decided the case the way he contends for the court should punish him severely for his criticisms. Members of the court sat in astonishment as he made his charge. They have now taken under advisement the case which called for this unexpected charge. Recently, both the supreme court and superior courts of Washington have taken upon themselves great liberty in reducing damage suit verdicts. In the case of Williams against the Great Northern Railroad, the supreme court reduced the verdict from $33,000 to $20,000. Mr. Graves contended that the railroad made no plea that the judgment was excessive, but went to the supreme court merely on points of law, and that the higher tribunal on its own motion made the reduction.

In speaking of the action of the supreme court, Mr. Graves stood before that body and accused its members of "undoubted transgressions of the statute law," "an unwarrantable assumption of power," and "unquestioned transgression of every principle of law or reason." Again he says: "By what process has the court advised itself of the conditions of the minds of the jury? Do omniscience and omnipotence here run hand in hand? Is it essential to the due discharge of its sworn duty that the court play Richelieu to defendant as Julie de Mortemar?" Mr. Graves said he was stunned and confounded by the decision, and asked: "Whence comes this sudden access of

power?" A very proper question, if Mr. Graves is right on his facts. A courageous attorney seems to have been needed and it looks as though Mr. Graves has risen to the emergency. The answer of the supreme court to his strictures will be awaited with interest not alone in Washington, but throughout the length and breadth of the land.—*Albany Law Journal.*

SURFACE SUPPORT BY COAL.

A decision that has something of the effect of an explosion on the law of coal mines is that of Griffin v. Fairmount Coal Co. (W. Va.), 53 S. E. Rep. 24. Of the opinion of the court a dissenting judge says it "avowedly disapproves and repudiates vital principles of the law of subjacent and lateral support, declared by every American court that has ever applied that law to a deed or contract by which the surface of land has been separated in title from the underlying coal, as well as the decisions of the English courts. It expressly condemns, by name, the decisions of Alabama, Illinois, Indiana, Iowa, New York, and Pennsylvania, and those of Ohio, and perhaps other states, without express reference to them. It demolishes at one fell blow the entire system of English and American law on the subject. This the opinion fully and expressly concedes."

It has generally been held in England and the United States that a grant of coal by one who retains title to the surface of the land does not give the owner of the coal the right to remove it in such a way as to destroy the support of the surface. This West Virginia case adopts the following rule as stated by the court itself in its syallabus: "Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land, and to mine, excavate, and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position." The extent to which the contrary doctrine has been carried is stated in Noonan v. Pardee, 200 Pa. 474, 55 L. R. A. 410, 86 Am. St. Rep. 722, 50 Atl. Rep. 255, as follows: "What the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave every pound of coal untouched under his land."

The West Virginia decision is based on the language by which the grantor conveyed mining rights and privileges for the removal of the coal, with the right "to mine, excavate and remove all of said coal." This language the majority of the court holds to be free from ambiguity, and sufficient to exclude any implied reservation of the right of support to the surface. There are two opinions representing the majority of the court, and two opinions by the dissenting judge, one of them very extended. The whole report covers more than 50 pages of the Southeastern Reporter, which amounts to a good deal more than 100 pages of the official reports. The dissenting judge contends that in a deed of coal underlying the surface of land the right of support to the surface is not relinquished without express language to that effect, and that a mere grant of a right to remove all the coal, without an express release of liability for consequent damages resulting from subsidence, or a provision for compensation for such damages, is not sufficient. The difference between the points of view of the minority and the majority judges relates chiefly to the question whether the express grant of the right to "remove all of said coal" is so unambiguous and explicit that it cannot be affected by any rules of interpretation. The report of the case is so voluminous that scant justice can be done to the arguments on the question by a brief summary like this. It is clear, however, that the decision makes a notable departure from the general current of the English and American cases on the question.—*Case and Comment.*

BOOK REVIEWS.

CYCLOPEDIA OF LAW AND PROCEDURE, VOL. 21.

One of the most important volumes of the Cyc. has just appeared, to-wit, volume twenty-one. The great general subject headings of law discussed in this volume are that of Guardian and Ward, treated in 276 pages, by Hon. Wm. F. Woerner; Habeas Corpus, in 84 pages, by Louis L. Hammon; Hawkers and Peddlers, in 20 pages, by C. A. Nichols, Health, in 58 pages, by Ernst Freund; Holidays, in 8 pages, by Solomon Wolff; Homesteads, in 200 pages, by Henry M. Dowling; Homicide, in 450 pages, by Wm. L. Clark, and Husband and Wife, in 624 pages, by William L. Burdick. Of these great monographs, all of which are on obviously very important subjects of law, we desire to call attention to the articles on Guardian and Ward, by Wm. F. Woerner, and Homesteads, by Henry M. Dowling. Mr. Woerner is well known to the writer of this review as one of the most accurate legal writers of whom he has any knowledge. Not indeed the most eloquent nor one who goes deep into metaphysical distinctions, but one who is above all things absolutely accurate. Mr. Woerner is the son of the late Hon. J. G. Woerner, author of the first edition of Woerner on Administration. He prepared the second edition of his father's great work, and the profession is already aware of the accuracy and exhaustiveness of the second edition of that great work. The article on Guardian and Ward, by Mr. Woerner in the Cyc. will be welcomed therefore as a great contribution to legal literature. Those, also, who have become acquainted with the work of Mr. Henry M. Dowling, through the columns of he CENTRAL LAW JOURNAL, will not wonder that the article on Homestead in the present volume of Cyc. is a work splendidly executed and written with wonderful clearness of expression. This latter quality is particularly noticeable in Mr. Dowling's work, and is not the least essential quality for a writer to possess who expects to make clear to lawyers and judges the fine distinctions of a branch of the law so complicated as Homestead. Altogether the 21st volume of Cyc. is very generously to be commended by the profession and should bring new lustre to a work which has already taken a high place in the literature of jurisprudence.

Published by American Law Book Company, New York.

BOOKS RECEIVED.

The Grand Jury, Considered from an Historical, Political and Legal Standpoint, and the Law and Practice Relating Thereto. By George J. Edwards, Jr., of the Philadelphia Bar. Philadelphia: George T. Bisel Company, Law Booksellers, Publishers and Importers, 1906. Buckram, price $3.00. Review will follow.

A Digest of the Bankruptcy Decisions Under the National Bankruptcy Act of 1898, Reported in the American Bankruptcy Reports, Volumes 1 to 14 in-

clusive (1898-1906), and of the Notes Therein Contained, with a Table of the Decisions Reported Therein and a Table of Sections of the Act of 1898, Construed in, or Considered in, or Affected by, Such Decisions. By Melvin T. Bender and Harold J. Hinman, of the Albany, N. Y., Bar. Albany, N. Y.: Matthew Bender & Company, 1906. Buckram, price $5.00. Review will follow.

The Law of Automobiles. By Xenophon P. Huddy, LL. B., of the New York Bar. Albany, N. Y.: Matthew Bender & Company, 1906. Buckram, price $3.50. Review will follow.

A Treatise on The Law of Carriers, as administered by the courts of the United States, Canada and England, covering the principles and rules applicable to carriers of goods, passengers, live stock, common carriers, connecting carriers, and interstate transportation, and the methods and procedure for their enforcement, furnishing a practical guide to litigants in the jurisdictions named, and containing the text of the Railroad Rate Act of 1906. By Dewitt C. Moore, of the Johnstown, New York, Bar. Albany, N. Y.: Matthew Bender & Co., 1906. Buckram, price $6.30. Review will follow.

HUMOR OF THE LAW.

Judge Johnson, a retired judge of the district court at Blackstone, was elected selectman of the town. The town appropriated money each year for concreting a certain amount of sidewalks, the abutters to pay half the cost of the work.

One day the judge became involved in an argument with one of the abutters, and losing his temper, told him to "go to h—l."

"Say, judge, ain't you going out of your jurisdiction? I thought Worcester was as far as you could send any one," the abutter replied.

Guest (in restaurant)—Bring me a Welsh rarebit, a broiled lobster, a bottle of imported ale, and a piece of mince pie.

Waiter—Will you please write out that order and sign it, sir?

Guest—What for?

Waiter—As a sort of alibi for the house to show the coroner, sir.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION — Extent. — Payment made and accepted for the assignment of a mortgage is not a settlement of a claim for the breach of a contract unless so intended.—Mayo v. Leighton, Me., 63 Atl. Rep. 293.

2. ADVERSE POSSESSION—Elements Constituting.—An entry on land with the intention of asserting ownership, and continued open and exclusive possession, exercising usual acts of ownership, for 20 years, is sufficient to establish title by adverse possession to the extent that the possession is actual and exclusive.—Mayo v. Dobbins, Ind., 77 N. E. Rep. 353.

3. ADVERSE POSSESSION—Tax Deed.—The two years' statute of limitations does not run under a tax deed void for imperfect and uncertain description of the land sold.—Dickinson v. Kansas City Imp. Co., Ark., 92 S. W. Rep. 21.

4. ADVERSE POSSESSION—Title by Prescription.—Proof of the continuity of good faith under which title to land is acquired is not a condition precedent to title by prescription.—Bennett v. Calmes, La., 40 So. Rep 911.

5. ADVERSE POSSESSION—Parol Evidence.—Parol evidence held admissible to show that, notwithstanding a written instrument conveying a life estate in land, adverse possession was asserted by the grantee therein and acquiesced in by the grantor.—Breland v. O'Neal, Miss., 40 So. Rep. 865.

6. ADVERSE POSSESSION—Trespasser.—A person whose only possession of land has been that of a trespasser for the purpose of cutting timber cannot obtain title by prescription.—St. Paul v. Louisiana Cypress Lumber Co., La., 40 So. Rep. 906.

7. ANIMALS—Pasturage Contract.—Where a defendant orally contracted to pasture certain cattle at a certain price per head, an agreement that he would not overstock the pasture nor permit the fences surrounding the same to become out of repair will be implied.—J. B. Wallis & Co. v. Wallace, Tex., 92 S. W. Rep. 43.

8. APPEAL AND ERROR—Bankruptcy.—In an action to have a deed declared a mortgage, denial of an application after an appeal entered from a judgment in favor of plaintiff, to have plaintiff's bankruptcy schedules reported to the court, held not error.—Alexander v. Grover, Mass., 77 N. E. Rep. 487.

9. APPEAL AND ERROR—Bill of Exceptions.—A bill of exceptions, though signed, will not be established on appeal where there are blanks in material parts of the instrument, and the papers intended to be inserted were not properly identified.—Anniston Mfg. Co. v. Southern Ry. Co., Ala., 40 So. Rep. 965.

10. APPEAL AND ERROR—Condemnation Proceedings.—Where, in railroad right of way condemnation proceedings, the evidence is conflicting, and the jury viewed the premises, their verdict will not be disturbed as excessive or inadquate unless it is manifestly against the weight of all of the evidence.—Prather v. Chicago Southern R. Co., Ill., 77 N. E. Rep. 430.

11. APPEAL AND ERROR—Parties.—A co party cannot prosecute a writ of error without joining all other co-parties identified in interest with him and obtain the

judgment of the court so far as the decree affects him.—Wuerzburger v. Wuerzburger, Ill., 77 N. E. Rep. 419.

12. APPEAL AND ERROR—Partition Decree.—On appeal from a partition decree, a third person, claiming under S, could not object on appeal to the manner and time in which testatrix's heirs were decreed to pay the value of the improvements to the heirs of S, nor that the heirship of testatrix's heirs was not proved.—Hill v. Gianelli, Ill., 77 N. E. Rep. 458.

13. APPEAL AND ERROR—Waiver of Objections.—Where defendant did not plead in the district court that a suit had been abandoned for want of prosecution, but answered to the merits, the objection cannot be raised on appeal.—Geisenberger v. Cotton, La., 40 So. Rep. 929.

14. ARBITRATION AND AWARD—Opinion of Arbitrators. —The court in determining whether arbitrators mistook or misunderstood the law cannot consider a statement of one of the arbitrators, but is confined to the award itself.—White Star Min. Co. v. Hultberg, Ill., 77 N. E. Rep. 327.

15. ATTORNEY AND CLIENT—Contract for Compensation.—Where an attorney was employed to settle certain cases for a certain sum, and the client repudiated the contract, he was liable for the services actually rendered.—Philbrook v. Moxey, Mass., 77 N. E. Rep. 520.

16. ATTORNEY AND CLIENT—Implied Authority. — An attorney under general retainer ordinarily has no implied authority to bind his client by a contract to sell land.—Baker v. City of New York, 98 N. Y. Supp. 331.

17. ATTORNEY AND CLIENT—Misconduct of Attorney.—In an action against an attorney for misconduct resulting in the loss of his client's title to an engine sold under conditional sale contract, such contract held admissible in evidence.—Whitney v. Abbott, Mass., 77 N. E. Rep. 524.

18. BANKRUPTCY—Debts Created by Fraud or Embezzlement.—An indebtedness created by the embezzlement and misappropriation of the funds of a bank by the debtor while acting in the capacity of vice-president of the bank, and having full control of its affairs, is one created by his fraud, embezzlement, and misappropriation while acting in a fiduciary capacity, and from which he is not released by a discharge in bankruptcy.—Harper v. Rankin, U. S. C. C. of App., Fourth Circuit, 141 Fed. Rep. 626.

19. BANKRUPTCY—Goods Used by Family of Bankrupt. —National Bankruptcy Act, § 17, does not except from discharge liabilities for goods purchased by a husband or parent and used by wife or child.—Schellenberg v. Mullaney, 98 N. Y. Supp. 482.

20. BANKRUPTCY- New Promise to Pay Barred Debt.—Where a bankrupt promises that when able he will pay a debt barred by the discharge, it is necessary for plaintiff in an action on the promise to show that defendant is able.—Kraus v. Torry, Ala., 40 So. Rep. 956.

21. BILLS AND NOTES—Bona Fide Holders. — Where fertilizers were sold without being tagged as required by law, and notes were given for the price, such notes were invalid even in the hands of a *bona fide* holder for value.—Alabama Nat. Bank v. C. C. Parker & Co., Ala., 40 So. Rep. 987.

22. BILLS AND NOTES—Substitution of Note.—An agreement to accept a note in payment of another one held based upon a sufficient consideration.—Brink v. Stratton, 98 N. Y. Supp. 421.

23. BONDS—Negotiability.—The negotiability of interest coupons of bonds issued by a joint stock association held dependent on and controlled by the negotiability of the bonds.—Hibbs v. Brown, 98 N. Y. Supp. 353.

24. BOUNDARIES—Description.—Where the description in a deed, if literally read, would not close, but by reversing the survey and applying it to the mouments the granted land could be located, the title of plaintiff in ejectment to the land described should have been submitted to the jury.—Calatro v. Chabut, N. J., 63 Atl. Rep. 272.

25. BRIDGES—Liability for Injury Due to Defects.—If a highway officer be responsible for private injury by his failure to repair a defective bridge, it is only where he had requisite funds to make the repairs —Bankins v. Police Jury of Calcasieu Parish, La., 40 So. Rep. 925.

26. BROKERS—Commissions —Brokers negotiating sale on terms accepted by employers held entitled to commissions on entire price, whether it was all paid or not. —Morgan v. Keller, Mo., 92 S. W. Rep. 75.

27. CARRIERS — Lien for Charges. — Carrier's lien for freight charges due from consignor held terminated by delivery of goods to consignee as agent of consignor.—Lembeck v. Jarvis Terminal Cold Storage Co., N. J., 63 Atl. Rep. 257.

28. CARRIERS—Transportation Charges. — A rate for transportation of men, poles, wires, and materials, applicable to one named telegraph company, is a discrimination either for or against such company, and will not be enforced by *mandamus* —State v. Atlantic Coast Line R. Co., Fla., 40 So. Rep. 875.

29 CARRIERS—Unjust Discrimination. — In an action against a carrier to recover alleged overcharges collected both before and after the rendition of an opinion by the railroad commission, such opinion was admissible under Code 1896, § 3496.—Anniston Mfg. Co. v. Southern Ry. Co., Ala., 40 So. Rep 965.

30. CARRIERS—What Constitutes —A telegraph company which maintains messenger boys for its patrons, making a charge therefor, is not a common carrier as to the services rendered by the messengers.—Hirsch v. American Dist. Telegraph Co , 98 N. Y. Supp. 371.

31. CHATTEL MORTGAGES—Mortgagee in Possession.—A mortgagee of chattels, having recoverd possession in *detinue* against a third person, in which action the mortgagor was a claimant, held not a trespasser in possession as against the subsequent mortgagee.—Daniel Bros. v. H. R. Jordan & Son., Ala., 40 So. Rep. 940.

32. CHATTEL MORTGAGES—Rights of Assignee.—Bank, as equitable assignee of chattel mortgage, held entitled to set up as defense in *detinue* by mortgagor outstanding superior title with which it connected itself to defeat plaintiff's right of recovery.—Dumas v. People's Bank, Ala., 40 So. Rep. 964.

33. CONSTITUTIONAL LAW—Delegation of Legislative Powers.—Loc. Acts 1903, p. 667, authorizing a dispensary in the town of Georgiana, and authorizing the commissioners having charge of the matter to suspend the dispensary at any time they may see fit, is unconstitutional. —Rose v. State, Ala., 40 So. Rep. 951.

34. CONSTITUTIONAL LAW — Involuntary Servitude.— One who has obtained money on agreement to work cannot complain of involuntary servitude on indictment under Acts 1892, p. 71, No. 50, where he does not controvert the averment of the indictment that he has not performed any work at all.—State v. Murray, La , 40 So. Rep. 980.

35. CONSTITUTIONAL LAW —Partial Invalidity of Statute.—Provisions in Acts 1902, p. 98, No. 90, § 21, relating to sales of intoxicating liquors, held invalid as discrimination against products of other states.—State v. Hazelton, Vt., 63 Atl. Rep. 305.

36. CONSTITUTIONAL LAW—Practice of Dentistry.—Act July 1, 1905 (Laws 1905, p. 320), § 3, excepting dental practitioners from other states from requirements as to examination, held not violative of Const. 1870, art. 4, § 22, prohibiting laws granting special privileges or immunities.—Kettles v. People, Ill., 77 N. E. Rep. 472.

37. CONSTITUTIONAL LAW—Primary Elections.—Primary Election Law (Laws 1905, p. 213), § 6, held invalid because the legislature delegates legislative power.—People v. Board of Election Com'rs of Chicago, Ill., 77 N. E. Rep. 321.

38. CONTRACTS—Antenuptial Agreements. — An antenuptial contract, providing that in case of separation the husband shall pay the wife the sum of $200, is contrary to public policy, and void.—Watson v. Watson, Ind., 77 N. E. Rep. 355.

39. CONTRACTS—Entire or Severable Contract.—Contract held to bind subscriber to pay $21 for the use of certain volumes of the first edition of a cyclopedia of law, and $7.50 per volume of the second edition as deliv-

ered.—Edward Thompson Co. v. Washburn, Mass., 77 N. E. Rep. 483.

40. CORPORATIONS—Foreclosure of Mortgages.—The office of president of a corporation does not confer authority upon the president to foreclose a mortgage running to the corporation, or to execute a foreclosure deed.—New England Mut. Life Ins. Co. v. Wing, Mass., 77 N. E. Rep. 376.

41. COURTS—Cases Involving Freehold.—Where a court of this state acquires jurisdiction of the parties to a contract concerning land in another state, a freehold will be deemed involved on appeal from the decree.—White Star Min. Co. v. Hultberg, Ill., 77 N. E. Rep. 327.

42. CRIMINAL EVIDENCE—Burden of Proving Former Acquittal.—The burden is on defendant to show in support of a plea of former acquittal that the former acquittal was for the same offense as that for which he is on trial.—Kilcoyne v. State, Tex., 92 S. W. Rep. 36.

43. CRIMINAL EVIDENCE—Intent in Carrying Weapon.—In a prosecution for homicide, defendant held not entitled to testify as to why he had a pistol with which he shot deceased.—Smith v. State, Ala., 40 So. Rep. 957.

44. CRIMINAL LAW—Imperfect Record.—Where steps necessary to the proceedings in a criminal trial were probably taken, but the minutes failed to show the fact, the supreme court may remand the case to the trial court to correct the minutes.—State v. Lee, La., 40 So. Rep. 914.

45. CRIMINAL TRIAL—Homicide.—In a prosecution for homicide, an instruction that malice could not be inferred from the use of a deadly weapon if there was any circumstances from which a want of malice could be inferred held properly refused.—Austin v. State, Ala., 40 So. Rep. 989.

46. CRIMINAL TRIAL—Instruction as to Reasonable Doubt.—In a prosecution for murder, it was proper to instruct that the doubt which would justify an acquittal must be actual and substantial, and not a mere possible doubt.—Tribble v. State, Ala., 40 So. Rep. 938.

47. CRIMINAL TRIAL—Objections to Evidence.—On a prosecution for homicide, an objection to an inquiry of a witness concerning a previous difficulty between defendant and deceased as "illegal and irrevelant" is insufficient.—Raines v. State, Ala., 40 So. Rep. 932.

48. CRIMINAL TRIAL—Refusal of Request to Charge.—The court is not justified in a criminal case in refusing a special charge because covered by a paragraph of the general charge.—Snyder v. State, Ala., 40 So. Rep. 978.

49. DAMAGES—Injury to Horse.—In an action for injuries to horse caused by operation of steam roller in highway, evidence of usable value of horse during period the owner was deprived of its use held admissible.—A. Buchanan's Sons v. Cranford Co., 98 N. Y. Supp. 378.

50. DEEDS—Cancellation.—If a grantor gives a warranty deed of land which he does not own, under the mistaken belief that he has title, it will not be canceled when no fraud on the part of the grantee is alleged.—Bibber v. Carville, Me., 63 Atl. Rep. 303.

51. DESCENT AND DISTRIBUTION—Debts of Intestate.—Heirs of S having acquired their interest in property in controversy from testatrix, and not from S, held not bound to apply any portion thereof to the debts of S.—Hill v. Gianelli, Ill., 77 N. E. Rep. 458.

52. EJECTMENT—Defenses.—In ejectment by one relying upon a deed given on the foreclosure of a trust deed, defendant under an answer stating facts showing such deed to be void was entitled to recover, though he did not ask to be permitted to redeem.—Cobe v. Lovan, Mo., 92 S. W. Rep. 93.

53. EJECTMENT—Possessory Action.—Actual possession of a part of a tract of land carries possession of the whole, as shown by the boundaries described in the title of the possessor, which is admissible in evidence to show the nature and extent of his possession.—Mott v. Hopper, La., 40 So. Rep. 921.

54. EQUITY—Laches.—Where both parties in a suit in equity are guilty of laches as to the time and manner of taking testimony, the decree will not be reversed for permitting it to stand.—Rice v. Cummings, Fla., 40 So. Rep. 889.

55. EQUITY—Relief Against Mistake.—Equity will not relieve against mistakes which ordinary care could have prevented.—Bibber v. Carville, Me., 63 Atl. Rep. 303.

56. ESTOPPEL—Mortgage.—Acts of plaintiff subsequent to conveyances alleged to amount only to a mortgage held not effective as an estoppel against plaintiff to claim that such deeds were in fact a mortgage.—Alexander v. Grover, Mass., 77 N. E. Rep. 487.

57. EVIDENCE—Judicial Notice.—On appeal, the court will take judicial notice that a certain place is a city, and the county seat of a certain county in another state.—Phillips v. Lindley, 98 N. Y. Supp. 423.

58. EXCEPTIONS, BILL OF—Extension of Time for Filing.—An agreement extending the time for presentation of a bill of exceptions is ineffective unless signed within term time, or within the time of a previous extension order or agreement.—Dothan Nat. Bank v. Wiggins, Ala., 40 So. Rep. 967.

59. EXECUTION—Inadequacy of Price.—Inadequacy of price received on execution sale held to be considered in connection with other irregularities for the purpose of setting aside the sale.—Misener v. Glasbrenner, Ill., 77 N. E. Rep. 467.

60. EXECUTORS AND ADMINISTRATORS—Bond on Appointment of Vice Consul.—Where a vice consul is appointed administrator of a citizen of the foreign country represented by such vice consul, he should be required to give a bond as required in other cases.—*In re* Wyman, Mass., 77 N. E. Rep. 379.

61. EXECUTORS AND ADMINISTRATORS—Claims for Personal Services.—A claimant presenting a claim for personal services rendered a decedent held not foreclosed from claiming compensation by reason of her acts in presenting a prior claim for money advanced.—Koebel v. Beetson, 98 N. Y. Supp. 408.

62. FIRE INSURANCE—Acceptance of Premium After Loss.—An insurer accepting the balance of the premium due on a marine policy after a disaster to the vessel insured does not thereby forfeit its defense that no such loss has occurred as that sued for.—Searles v. Western Assur. Co., Miss., 40 So. Rep. 866.

63. FIRE INSURANCE—Authority of Agent.—Insured held bound to take notice that a local insurance agent had no authority to orally change the clause in the policy relating to vacancy.—Harris v. North American Ins. Co., Mass., 77 N. E. Rep. 493.

64. FRAUDULENT CONVEYANCES—Rights of Subsequent Creditors.—A conveyance from husband to wife in execution of an unenforceable parol promise, made before marriage, will not be set aside at the suit of a creditor of the husband who became such after the conveyance.—Welch v. Mann, Mo., 92 S. W. Rep. 98.

65. GUARANTY—Diligence of Creditor.—In an action against one who had guaranteed the collection of a note, held that the insolvency of the principal was no excuse for the holder's failure to endeavor to collect from him.—Phillips v. Lindley, 98 N. Y. Supp. 423.

66. HEALTH—Powers of Board of Health.—Board of health of town held to have power to prohibit or regulate certain employments or declare them nuisances.—Inhabitants of Belmont v. New England Brick Co., Mass., 77 N. E. Rep. 504.

67. HIGHWAYS—Establishment.—In a suit to restrain the imposition of an assessment for the construction of a gravel road, evidence showing fraud and irregularity in the viewers' report and other proceedings before the commissioners held irrelevant.—Todd v. Crail, Ind., 77 N. E. Rep. 402.

68. HOMESTEAD—Exemption.—Where a homestead is sold at judicial sale for a debt and a surplus remains, the debtor may claim his exemption in such surplus to enable him to purchase another homestead.—Johnson v. Agurs, La., 40 So. Rep. 928.

69. HOMESTEAD—Renunciation.—A married woman

may sign a renunciation with her husband of a homestead without her examination out of the presence of her husband, and without recital in the deed that she observed all the formalities required by Civ. Code, art. 129.—Cormier v. Hoyt, La., 40 So. Rep. 912.

70. HOMICIDE—Deadly Character of Weapon.—The question whether or not a weapon is a deadly one is generally for the court, but whether a particular weapon is deadly or otherwise is, in many cases, a question for the jury, to be determined from the description of the weapon, etc.—Tribble v. State, Ala., 40 So. Rep. 988.

71. HOMICIDE—Self-Defense.—Where the other elements of self-defense existed, and deceased had made threats against defendant which had been communicated to him, defendant was entitled to act on any overt act or hostile demonstration, though not amounting to a felonious assault.—George v. State, Ala., 40 So. Rep. 961.

72. HUSBAND AND WIFE—Judgment Against Wife's Separate Estate.—A deficiency decree, though entered in a court of equity on a foreclosure sale, is not a charging in equity of a married woman's separate estate within the constitution.—Rice v. Cummings, Ala., 40 So. Rep. 889.

73. HUSBAND AND WIFE—Validity of Note.—Where a husband borrowed money from his wife and gave a note to his son, who indorsed it to the wife, the note was void as though made directly to the wife.—Caldwell v. Nash, Mass., 77 N. E. Rep. 515.

74. INDICTMENT AND INFORMATION—Minutes of Court.—That the minutes of the court at the term at which an indictment was found fail to set out the original grand jury venire held insufficient to sustain a motion to quash.—Snyder v. State, Ala., 40 So. Rep. 978.

75. INJUNCTION—Alternative Relief.—To authorize a decree for damages as an alternative for an injunction, a case in equity must be made, and laches which would defeat the right to an injunction will also defeat the right to the alternative relief.—Beers v. Chicago, M. & St. P. Ry. Co., U. S. C. C. of App., Seventh Circuit, 141 Fed. Rep. 957.

76. INJUNCTION—Schools and School Districts.—*Mandamus* and not injunction held proper remedy to prevent enforcement of contract of public school board with state board of education relating to manner of conduct of schools.—Lindblad v. Board of Education of Normal School Dist., Ill., 77 N. E. Rep. 450.

77. INSANE PERSONS—Rights of Insane Widow.—It is not necessary that the interest of an insane widow in her husband's estate should be ascertained and paid over and used for her maintenance before her dower and homestead rights may be sold.—Robinson v. Dayton, Mass., 77 N. E. Rep. 503.

78. INSOLVENCY—Provable Claims.—A note given by a husband for money borrowed from his wife does not constitute an equitable liability on the part of the husband provable against his insolvent estate.—Caldwell v. Nash, Mass., 77 N. E. Rep. 515.

79. JOINT ADVENTURES—Accounting.—That corporation voted stock in other corporations, so as to eliminate complainant as general manager thereof, held not to constitute misconduct, entitling complainant to an accounting.—Simmons v. Lima Oil Co., N. J., 63 Atl. Rep. 258.

80. JOINT STOCK COMPANIES—Issuing Bonds.—The issues of bonds and coupons by a joint stock association secured by its assets, even with a stipulation against personal liability of the shareholders, is legitimate, and contravenes no statute or rule of public policy.—Hibbs v. Brown, 98 N. Y. Supp. 353.

81. JUDGMENT—Conclusiveness as to Parties.—A second mortgagee held not affected by a judgment in favor of the first mortgagee in an action by the latter against a stranger, to which action such second mortgagee was not a party.—Daniel Bros. v. H. R. Jordan & Son, Ala., 40 So. Rep. 940.

82. JUDGMENT—Presumption as to Payment.—A judgment is presumed to be paid after the lapse of 20 years from the time the debt became due, and the party asserting nonpayment has the burden of proving it.—Janvier v. Culbreth, Dela., 63 Atl. Rep 309.

83. JURY—Mistake in Name of Juror.—That the name of a juror appeared on a slip drawn from the hat as "Chapan," while the juror's name was "Chapman," held not ground for quashing venire.—Coleman v. State, Ala., 40 So. Rep 977.

84. LANDLORD AND TENANT—Construction of Lease.—Lease of ground floor of building construed, and held that vestibule remained under lessor's control, but that lessee was entitled to unobstructed use of window facing the same.—Whitehouse v. Aiken, Mass., 77 N. E. Rep. 499.

85. LANDLORD AND TENANT—Obligation to Pay Rent.—A lessee, deprived at the beginning of the term from possession of demised premises by one claiming possession under title paramount to that of the lessor, is not liable for rent.—Smith v. Barber, 98 N. Y. Supp. 365.

86. LANDLORD AND TENANT—Waiver of Lien on Crops.—Lien of a landlord on crops to secure an advance to the tenant held waived as against a buyer from tenant.—Planters' Compress Co. v. Howard, Tex., 92 S. W. Rep. 44.

87. LIFE ESTATE—Leases.—Where a husband held only a life estate in certain land of his deceased wife, a lease executed by the husband, in which his children by such wife did not join, terminated by operation of law on the husband's death.—Bidwell v. Piercy, N. J., 63 Atl. Rep. 261.

88. MALICIOUS PROSECUTION—Competency of Evidence.—In an action for malicious prosecution for trespass by a minor, a lease showing that the father of the minor was in possession of the land in question as a tenant under the owner was competent evidence for plaintiff.—Rutherford v. Dyer, Ala., 40 So. Rep. 974.

89. MANDAMUS—Discretion of Court.—*Mandamus* will not be granted when it will work injustice or introduce confusion and disorder, nor when it would prove unavailing.—Bibb v. Gaston, Ala., 40 So. Rep. 936.

90. MASTER AND SERVANT—Defective Appliances.—A servant held entitled to rely upon the safety of such implements as are provided by the master for his use, unless their defectiveness is open to the observation of an ordinarily prudent man.—Columbian Enameling & Stamping Co. v. O'Burke, Ind., 77 N. E. Rep. 409.

91. MASTER AND SERVANT—Defective Premises.—An express company held not relieved from liability for injury to an employee resulting from defective premises, by reason of a contract between defendant and a railroad company, under which the latter was charged with the duty of keeping the premises in repair.—Pacific Express Co. v. Shivers, Tex., 92 S. W. Rep. 46.

92. MASTER AND SERVANT—Fraudulent Breach of Contract.—The act of one who obtains money on representation that he will stay and work, and immediately thereafter leaves, falls within the terms of Acts 1892, p. 71, No. 50.—State v. Murray, La., 40 So. Rep. 930.

93. MASTER AND SERVANT—Instructions in Personal Injury Case.—In an action for the death of a servant killed in a mine, it was proper to refuse to charge that, if the jury believed from the evidence that the death was occasioned by an accident, the verdict should be for defendant.—Cahaba Southern Min. Co. v. Pratt, Ala., 40 So. Rep. 943.

94. MASTER AND SERVANT—Proof and Variance in Personal Injury Case.—In an action by a servant for personal injuries, evidence that plaintiff was injured on a "boat" held not variant from an allegation that he was injured on a "barge."—Monongahela River Consol. Coal & Coke Co. v. Hardsaw, Ind., 77 N. E. Rep. 363.

95. MASTER AND SERVANT—Release of Liability for Negligence.—An agreement between an express company and an employee, relieving the company from liability for injuries resulting through the negligence of the company, is void as against public policy.—Johnston v. Fargo, N. Y., 77 N. E. Rep. 388.

96. MASTER AND SERVANT—Repairing Machinery.—

Negligence in repairing an elevator, whereby an employee was injured in its use, held that of the master, though the work was done by a co-employee.—Hatch v. Pike Mfg. Co., N. H., 63 Atl. Rep. 306.

97. MINES AND MINERALS—Oil Lease.—A provision in an oil and gas lease that the lessee could cancel the contract or any part thereof at any time held ambiguous, and subject to construction according to the contemporaneous acts of the parties.—Ramage v. Wilson, Ind., 77 N. E. Rep. 368.

98. MONEY RECEIVED—Recovery of Money Wrongfully Obtained.—Payment made to a union composed of bricklayers and plasterers held extorted by threats, in violation of Gen. St. 1902, § 1296, and recoverable.—March v. Bricklayers' & Plasterers' Union No. 1, Conn., 63 Atl. Rep. 291.

99. MORTGAGES—Foreclosure.—Where land subject to a mortgage was conveyed to defendant by a deed which was in fact a mortgage, defendant's purchasing it on foreclosure of the first mortgage did not confer an absolute title on him.—Alexander v. Grover, Mass., 77 N. E. Rep. 487.

100. MORTGAGES—Right to Foreclosure.—Where the amount due on a mortgage was tendered before any steps were taken to make a sale under the power contained therein, the sale was invalid.—Wittmeier v. Tidwell, Ala., 40 So. Rep. 963.

101. MUNICIPAL CORPORATIONS — Incorporation Proceedings —An application by petitioners for the incorporation of a town, to amend the records of the board of county commissioners *nunc pro tunc*, may be granted *ex parte* without notice to objectors. — Fleener v. Johnson, Ind , 77 N. E. Rep. 366

102. MUNICIPAL CORPORATIONS — Parkway Rules. — Rules and regulations provided by park commissioners for the use of parkways are only valid in so far as they are reasonable under the conditions existing at the time they are attacked.—Whitney v. Commonwealth, Mass , 77 N. E. Rep. 516.

103. MUNICIPAL CORPORATIONS— Rights of Occupants of Market Stalls.—A city council cannot prevent the lessee of a stall in the market from employing telephonic service, providing the rights of others are not affected and legitimate ordinances of the municipality are not disregarded.—Swayze v. City of Monroe, La., 40 So. Rep. 926.

104. PERJURY—False Swearing.—Under Ky. St. 1903, §§ 1174, 1177, defendant held properly charged with subornation of perjury, though the offense committed by the person suborned was "false swearing."—Henderson v. Commonwealth, Ky , 91 S. W. Rep. 1141.

105. PHYSICIANS AND SURGEONS — Dentists Practicing Without License.—Act July 1, 1905 (Laws 1905, p. 320, § 3), held to prohibit continuance of practice of dentistry without a license by person who had previously practiced illegally.—Kettles v. People, Ill., 77 N. E. Rep. 472.

106. PLEADING—Order Allowing Amendment.—An order allowing an amendment of the summons and complaint without notice to defendants who had appeared cannot be confirmed *nunc pro tunc*. — Luckey v. Mockridge, 98 N. Y. Supp. 335.

107. RAILROADS—Backing Trains.—Backing of train in freight yards at rate of six miles an hour, resulting in injury to servant of railroad company, held not negligence. —Dacey v. Boston & M. R. R., Mass., 77 N. E. Rep. 523.

108. RAILROADS—Contributory Negligence.—In an action against a railroad company for the death of a 14-year old boy who was struck by a train while driving a team over a crossing, evidence held to show, as a matter of law, that deceased was guilty of contributory negligence.—Walker v. Wabash R. Co., Mo., 92 S. W. Rep. 83.

109. RAILROADS—Liability for Loss of Baggage.—Railroad's failure to check baggage held no defense to an action for the loss thereof.—Texas & P. Ry. Co. v. Weatherby, Tex., 92 S. W. Rep. 58.

110. RAPE — Corroboration of Female. — Failure to charge that a conviction for rape cannot be had on the testimony of the female unless corroborated is not reversible error where no request therefor is made.—People v. Biglizen, 98 N. Y. Supp. 361.

111. SALES—Conditional Sale.—The bringing of an action to recover the entire price of an article, sold under a conditional sale contract, before the last installment matured, the attachment of the buyer's property, and the taking of judgment against him on his default, held a waiver of the seller's title under the conditional sale.—Whitney v. Abbott, Mass., 77 N. E. Rep. 524.

112. SALES—Delivery to Carrier.—Where goods were bought f. o. b. at a certain place, the carrier became the seller's agent, and there was no sale until delivery at the point of destination.—Alabama Nat. Bank v. C. C. Parker & Co., Ala., 40 So. Rep 987.

113. SALES—Waiver of Right to Rescind. — Conduct of seller after ascertaining a breach of the buyer's covenant in the contract of sale, authorizing rescission, held a waiver of the seller's right to rescind.—Bernard v. Sloan, Cal., 84 Pac. Rep. 232.

114. SEDUCTION—Evidence as to Other Acts.—In action for seduction, where child was born on January 14, 1904, plaintiff held properly required to testify whether she had not had intercourse with another person in the latter part of May and the fore part of June, 1903.—Kesselring v. Hummer, Iowa, 106 N. W. Rep. 501.

115. SET-OFF AND COUNTERCLAIM—Allowance for Improvements.—Statement as to set-off of rents against an allowance for improvements by an occupant of land where a sale by a guardian to herself was avoided, after her subsequent voluntary conveyance to defendant.—Sunter v. Sunter, Mass., 77 N. E. Rep. 497.

116. SPECIFIC PERFORMANCE—Contract to Buy Land.—Vendor of land held not entitled to specific performance, when deed under which he held title reserved right to adjoining owner to keep windows open in house on adjoining lot.—Remsen v. Winger, 98 N. Y. Supp. 388.

117. SPECIFIC PERFORMANCE—Grounds for Refusal — Where specific performance of a telephone ordinance would operate to bankrupt the company, complainants would be left to their remedy at law.—Maryland Telephone & Telegraph Co v. Charles Simons' Sons Co., Md , 63 Atl. Rep. 314.

118. SPECIFIC PERFORMANCE—Performance by Plaintiff.—Contract for conveyance of real estate held to require payment by plaintiff of $99.80, or to be so indefinite that in either case plaintiff was not entitled to performance upon offer to pay $51.50.—Reymond v. Laboudigue, Cal., 84 Pac. Rep. 189.

119. SPECIFIC PERFORMANCE—Remedy at Law.—The remedy of specific performance is available to the vendor, though he may have an action at law for the purchase price.—Migatz v. Stieglitz, Ind., 77 N. E. Rep. 400.

120. STREET RAILROADS—Injury to Alighting Passenger.—Passenger alighting from street car without looking where she was about to step held not entitled to recover from street car company for injuries from falling into gutter.—Quinlan v. Newton & B. St. Ry., Mass., 77 N. E. Rep. 486.

121. SUNDAY—Contracts.—Where liquor purchased on Sunday was not delivered nor received until a subsequent secular day, that the order was taken on Sunday was no defense to an action for the price.—P. J. Bowlin Liquor Co. v. Brandenburg, Iowa, 106 N. W. Rep. 497.

122. TAXATION—Constitutionality of Scheme of Assessment.—The Georgia scheme of taxation, requiring the citizen to know what property owned by him is subject to taxation, and to disclose it fully to the taxing officer, is constitutional.—Georgia R. & Banking Co. v. Wright, Ga., 58 S. E. Rep 251.

123. TAXATION—Notice of Sale.—A notice of tax sale held not illegal because of failure to file with the county auditor an affidavit setting forth the qualifications of the paper, as required by Laws 1890, p. 346, ch. 120, § 2.—Blakemore v. Cooper, N. Dak., 106 N. W. Rep. 566.

124. TAXATION—Penalty and Costs.—Where a tax has been improperly enjoined, 10 per cent on the amount of the tax, penalties, and costs must be allowed as statu-

tory damages.—Tulane University v. Board of Assessors, La., 40 So. Rep. 445.

125. TAXATION—Situs of Property.—A corporation's franchise has its *situs* for the purpose of taxation only at the place where the corporation's principal place of business is situated.—San Joaquin & K. R. Canal & Irrigation Co. v. Merced County, Cal., 84 Pac. Rep. 285.

126. TAXATION—Tax Sale.—Under a statute relative to forfeiture of land to the state for delinquent taxes, a sale by the state of land claimed to have been forfeited to it held a nullity.—St. Paul v. Louisiana Cypress Lumber Co., La., 40 So. Rep. 906.

127. TRADE-MARKS AND TRADE-NAMES—False Representation.—Every exaggerated puff of a dealer's goods is not such a false representation as will prevent relief in a suit to restrain infringement of trade-mark.—Regent Shoe Mfg. Co. v. Haaker, Neb., 106 N. W. Rep. 595.

128. TRADE-MARKS AND TRADE-NAMES—Unfair Competition.—When a mercantile company has acquired a trade-name in a particular locality, it is entitled to protection against unfair competition.—Regent Shoe Mfg. Co. v. Haaker, Neb., 106 N. W. Rep. 595.

129. TRESPASS—Cutting Timber.—Where a trespasser cut timber and manufactured it into lumber, it was liable to the owner of the land for the value of the lumber less the cost of manufacture.—St. Paul v. Louisiana Cypress Lumber Co., La., 40 So. Rep. 906.

130. TRIAL—Credibility of Witness.—It is for the court and not the jury to pass on the credibility of witnesses and determine just how much credence is to be given to their testimony.—Goodwin v. Sommer, 97 N. Y. Supp. 960.

131. TRIAL—Definition of Words.—The words "tenant" and "rented," as used in an instruction, held easily understood by the jury without further definition.—J. V. Pilcher Mfg. Co. v. Teupe's Ex'x, Ky., 91 S. W. Rep. 1125.

132. TRIAL—Direction of Verdict.—Where the determination of the issues involves the credibility of the witnesses, and rests on inferences and deductions from the facts proved, it is error to direct a verdict for the party having the burden of proof.—Siebe v. Heilman Mach. Works, Ind., 77 N. E. Rep. 303.

133. TRIAL—Findings.—In an action against two defendants jointly, a finding that only one is liable is not without the issues, but sustains a judgment against him.—McKee v. Cunningham, Cal., 84 Pac. Rep. 260.

134. TRIAL—Instructions.—An instruction authorizing a verdict for one of the parties on a finding of certain facts held erroneous unless it includes every fact necessary to sustain a verdict for such party.—Standard Distilling & Distributing Co. v. Harris, Neb., 106 N. W. Rep. 582.

135. TRIAL—Interested Witnesses.—Where plaintiff was a witness, the duty to charge that the jury may consider the fact that she is interested is not met by a general instruction that the jury are the proper judges of the credibility of witnesses.—Denver City Tramway Co. v. Norton, U. S. C. C. of App., Eighth Circuit, 141 Fed. Rep. 599.

136. TRIAL—Involuntary Nonsuit.—Where the testimony of the plaintiff tends to prove all the material allegations of his complaint, a nonsuit will not be granted.—Archibald Estate v. Matteson, Cal., 84 Pac. Rep. 840.

137. TRIAL—Reception of Evidence After Close of Trial.—In proceedings for the establishment of a gravel road, it was within the discretion of the trial court to permit the introduction of certain documentary evidence several days after the evidence was closed.—Todd v. Crail, Ind., 77 N. E. Rep. 402.

138. TRIAL—Striking Out Evidence.—Where a deed has been admitted in evidence over the objection of plaintiffs, plaintiffs held not entitled as a matter of right to have the deed stricken out on motion; their remedy being to ask for instructions as to the effect of the deed as evidence.—Walker v. Lee, Fla., 40 So. Rep. 881.

139. TROVER AND CONVERSION—Title to Support.—A person in possession of personalty which he does not own may maintain conversion as against one not connected with the legal title.—McEchron v. Martine, 97 N. Y. Supp. 951.

140. TRUSTS—Option to Buy Land.—The act of one of two parties to an option for the purchase of land in obtaining title under a second contract, made after the termination of the first one, held not a fraud on the other party.—Commercial Bank v. Weldon, Cal., 84 Pac. Rep. 171.

141. TRUSTS—Testamentary Trusts.—Where a testamentary trustee claimed counsel fees in procuring distribution, the court did not lose jurisdiction of such item by passing on other items and refusing such allowance for alleged lack of jurisdiction.—*In re* O'Connor's Estate, Cal., 84 Pac. Rep. 317.

142. UNITED STATES—Immunity from Suit.—A state cannot maintain in the Supreme Court of the United States suit against the Secretary of the Interior and the Commissioner of the General Land Office, to restrain them from allotting swamp lands within the limits of an Indian Reservation.—State of Oregon v. Hitchcock, U. S. S. C., 26 Sup. Ct. Rep. 568.

143. VENDOR AND PURCHASER—Abatement of Price.—A purchaser of land may have an abatement of the price on the ground of fraud by the vendor in the sale of the land.—Williams v. Neal, Ala., 40 So. Rep. 943.

144. VENUE—Place of Trial.—In determining the place of trial, the place where the transaction occurred will have a controlling influence, as provided by general practice rule 48.—Hays v. Faatz Reynolds Felting Co., 98 N. Y. Supp. 386.

145. WATERS AND WATER COURSES—Flooding Land.—One casting surface water on another's lands held not relieved from liability for the injury therefrom by a third person damming the water on the far side of the lands, preventing its escape.—Campbell Turnpike Road Co. v. Maxfield, Ky., 91 S. W. Rep. 1135.

146. WILLS—Contract to Will.—Where a devisee took only a life estate in property in controversy, plaintiff acquired no rights therein under a contract by the devisee to will the property to her.—Hill v. Gianelli, Ill., 77 N. E. Rep. 458.

147. WILLS—Election.—A widow having failed to file her election to repudiate her husband's will, by which she was given a life estate in lands owned by them as tenants by the entirety, within the time prescribed by Burns' Ann. St. 1901, § 2666, she was estopped to claim the land as survivor of the entirety.—Young v. Biehl, Ind., 77 N. E. Rep. 406.

148. WILLS—Executor's Final Accounting.—Where, in a suit to set aside a will, there was nothing in the answer to show that the executor had any control over the real estate devised, it would be presumed that the executor's final settlement of the estate applied only to the personal property.—Stuckwisch v. Kamman, Ind., 77 N. E. Rep. 849.

149. WITNESSES—Cross Examination.—In a prosecution for homicide, refusal to permit a witness to be asked on cross examination whether he had not been arrested and committed to jail for killing deceased held error.—Snyder v. State, Ala., 40 So. Rep. 978.

150. WITNESSES—Cross Examination of Accused.—Where a prisoner testifies in his own behalf, he may be cross-examined as to the circumstances connecting him with the crime.—Sawyer v. United States, U. S. S. C., 26 Sup. Ct. Rep. 575.

151. WITNESSES—Discrediting Testimony.—In railroad right of way condemnation proceedings, certain testimony offered for the purpose of discrediting evidence of a witness as to values held properly excluded.—Prather v. Chicago Southern R. Co., Ill., 77 N. E. Rep. 430.

152. WORK AND LABOR—Services Between Persons in Family Relation.—Where a daughter-in-law, after the death of her husband, while she was maintaining a household of her own, rendered services for her father-in-law, there was no presumption that the services rendered were gratuitous.—Koebel v. Beetson, 98 N. Y. Supp. 408.